IN THE

Supreme Court of the United States

October Term, 1950.

No. 517

GRACE HATTLEY RAMEY, ROBERT W. RAMEY, DAISY DOUGHERTY and P. S. DOUGHERTY, also known as Mrs. Daisie Dougherty,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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[illegible] & Company, Law Printers, Los Angeles, Phone, MA. [illegible]

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Review Sought and by Whom.

Petitioners who were appellants in the United States Court of Appeals for the Ninth Circuit [R. 41-42] and defendants in the United States District Court for the Southern District of California [R. 2] ask this Court to review the judgment of said Court of Appeals [R. 59] entered on January 22, 1951, in accordance with Rule 38 of this Court.

Jurisdiction.

Sections 1254 (1), 2101 (c) and 2106, U. S. C. A. prescribe the jurisdiction of this Court and its power to determine the case. Act of June 25, 1948, 62 Stat. 928, 961, 963.

Dockets of Courts Below.

The docket of the United States District Court in case No. 9819Y show filings as:

In 1949.

1. June 9 Complaint of United States of America [2-6].
2. July 25 Motion to dismiss complaint. [7-12.]
3. Aug. 8 Order denying motion to dismiss. [13.]
4. Aug. 12 Opinion of District Judge, 85 Fed. Supp. 354. [14-17.]
5. Aug. 29 Motion for leave to file a Second Motion to Dismiss. [18-21.]
6. Sept. 12 Order denying motion No. 5 above. [22.]
7. Sept. 23 Answer of defendants. [22-24.]
8. Nov. 30 Motion for Judgment on the Pleadings. [24-29.]
9. Dec. 16 Opposition to Motion for Summary Judgment. [30-33.]
10. Dec. 19 Order granting Motion No. 8 above in part. [33-34.]
11. Dec. 21 Judgment. [34-37.]
12. Dec. 31 Motion to Alter or Amend Judgment. [38-40.]

In 1950.

13. Jan. 16 Order denying motion to alter or amend judgment. [41.]
14. Mar. 15 Notice of Appeal. [41-42.]
15. Mar. 21 Designation of Contents of Record on Appeal. [42-43.]

The docket of the Court of Appeals in case No. 12522 show filings as:

In 1950.

16. April 14 Transcript of Record. [45.]
17. April 24 Appellants' Designation of Record for printing and Statement of Points. [46-47.]
18. Nov. 8 Oral argument and Order of Submission. [51.]

In 1951.

19. Jan. 22 Order directing filing of opinion and filing and recording of judgment. [51.]
20. Jan. 22 Opinion by District Judge Clark. [52-58.]
21. Jan. 22 Judgment. [59.]

Statement.

We were sued June 9, 1949, by the United States of America as plaintiff. No tenant, no Price Administrator, no Housing Expediter, was a plaintiff. Defendants were named only in the title of the action or the complaint form. No specific allegation of any individual acts of any defendants was made. The complaint did not name a first or second cause of action. The complaint sought

treble damages, restitution, and an injunction. The complaint recited [2] that it was filed under Public Law 31, 81st. Congress, 1st Session, and prior laws relating to rent control. Public Law 31 is the Housing and Rent Act of 1949, 63 Stat. 21.

The complaint [6] and the opinion of the Court of Appeals [52-53] show the alleged violations of the rent control laws occurred between January 7, 1945, and June 30, 1949 [6] on two apartment house units, during which period four tenants were alleged to have paid a total of $1002.50 in excess of the legal maximum rents on the two units. The statement of excess charges filed June 9, 1949 [6] appended to the complaint shows as to unit 820¼ that there was a 15% increase on the $80.00 rent on May 1, 1948, making it $92.00. The Housing and Rent Act of 1947, 61 Stat. 193, 198, permitted a 15% increase. The statement of excess charges as to the second tenants in unit 820¼ and the tenant in unit 830 shows that the United States did not wait the thirty day period required by the Housing and Rent Act of 1949 before the United States had a right to file this action. [6.]

Our motion to dismiss [8] presented the points that the United States had no right to bring this action prior to April 1, 1949; that the right of action given to the United States in the Housing and Rent Act of 1949 was not retroactive; and that the attempt to give the United States the right in a civil action to sue one citizen for and on behalf of another citizen was unconstitutional. [10-12.]

Our motion to dismiss was denied. [13.] An opinion was filed by the District Judge. [14-17.] The point on constitutionality raised by the defendants not having been mentioned in the Court's opinion a motion for leave to file

a second motion to dismiss was filed. [18-21.] This motion specifically raised the point that section 204 of the Housing and Rent Act of 1949, 63 Stat. 21, is unconstitutional, and that the attorneys who appeared for the United States did not show or have any authority to do so. This motion was filed August 29, 1949 [21] and was heard September 12, 1949. There was no delegation by the Attorney General of authority to attorneys for the Housing Expediter to appear for the United States until September 24, 1949. Such delegation was published in the Federal Register of October 6, 1949.

The Court of Appeals [58] concedes that no authority had ben delegated prior to the filing of the complaint or until after the denial of the motion for leave to file a second motion to dismiss. The Court of Appeals said:

> "However, this authority was given before the judgment was rendered by the lower court, and there is no showing of prejudice to the appellants if the attorney's authority is given a retroactive effect from the time the complaint was filed." [58.]

Answer of defendants was filed September 23, 1949. Eight defenses were set out. [22-24.] The first defense denied that the attorneys who appeared for the United States had any authority to do so. The second defense questioned the constitutionality of Section 204 of the Housing and Rent Act of 1949. The third defense was that Section 204 purporting to give a right of action to the United States had no retroactive effect. The fourth defense was that the tenants were indispensable parties. The fifth defense was that the complaint failed to state a claim against defendants upon which relief can be granted. The sixth defense was that the action is for the collection of a penalty. The seventh defense was that the United

States had no right of action for restitution. The eighth defense was that there was no war.

Motion for judgment on the pleadings was made by plaintiff on December 19, 1949. [24-29.] Opposition to this motion was made by defendants. [30-33.] The motion was granted [34] after plaintiff dismissed its prayer for an injunction and omitted reference to treble damages. [34-35.] Judgment was entered December 21, 1949. [34-37.] The judgment was for $1002.50 to be refunded to tenants, when and if found, and $43.72 costs. The judgment fixed the place and form of payment which was made payable to the Treasurer of the United States. [36.] The judgment named the tenants to whom refunds were to be made and specified the amounts each tenant (with the exception of the Shea-O'Brien tenants) was to receive. The judgment also provided that if the plaintiff was unable to locate any of the tenants the amounts due "shall be retained by the Treasurer of the United States." [36.] The judgment dismissed the second cause of action. [37.] And the judgment dismissed the whole action as to the defendants named Doe.

Motion to alter or amend the judgment was filed by defendants. [38-40.] This motion was denied. [41.] Notice of Appeal to the Court of Appeals for the Ninth Circuit was filed March 15, 1950. [42.] Designation of contents of record on appeal was filed March 21, 1950. [44.] Designation of record for printing and statement of points on appeal was filed April 24, 1950. [46-47.] The points stated were:

1. That section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional. [46.]

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945. [46.]

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff. [46.]

4. That the trial court erred in granting summary judgment against appellants. [47.]

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review. [47.]

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money. [47.]

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff. [47.]

Questions Presented for Review Here.

Petitioners assign the following errors of the Court of Appeals:

1. The Court erred in declining to pass on the constitutionality of Section 204 of the Housing and Rent Act of 1949. [53.]

2. The Court erred in failing to hold that Section 204 of the Housing and Rent Act of 1949 had no retroactive effect.

3. The Court erred in approving lax administration of the law by holding that the attempted delegation of authority of September 24, 1949, by the Attorney General,

to attorneys for the Housing Expediter had retroactive effect, and ignoring the appearance of said attorneys herein from June 9, 1949, to September 24, 1949, without any color of authority.

4. The Court erred in failing to hold that the tenants concerned were indispensable parties in the absence of the Price Administrator as plaintiff under the 1942 Act, as amended, and in the absence of the Housing Expediter as plaintiff under the 1947 Act, as amended.

5. The Court erred in holding that the complaint herein stated a claim on which relief could be granted in view of the fifth defense in the answer.

Reasons for Issuance of Writ.

The Court of Appeals and the District Court have decided an important question of federal law which has not been, but should be, settled by this Court, namely, the right of the United States to maintain a civil suit for and on behalf of one citizen against another. How many section 7 Sherman Anti-Trust Act cases can be presented by the United States at public expense for private benefit if the judgments of the lower courts are correct?

The Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision. This case was on the docket of the District Court for setting for trial. [30.] Defendants there were entitled to the benefit of Rule 16(2) F. R. C. P. (pre-trial procedure) as to the necessity or desirability of amendments to the pleadings where they had pleaded a defense and objection under Rule 12(b) (6).

Prayer.

WHEREFORE, petitioners pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit and that said judgment be reversed.

GRACE HARTLEY EMERY, ROBERT W. EMERY, DANIEL DOUGHERTY and P. S. DOUGHERTY, also known as MRS. DANIEL DOUGHERTY,
Petitioners,

By DANIEL DOUGHERTY.
Counsel for Petitioners.

Certificate.

I certify that my full name is Daniel Ney Dougherty; that I was admitted to the bar of this Court on April 29, 1918; that I am one of the petitioners herein, and counsel for the others; and that, in my opinion, substantial questions are presented in this petition.

DANIEL NEY DOUGHERTY.

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UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Argument.

(a) Power of This Court and Scope of Review.

This Court has lately held in *United States v. Munsingwear,* 340 U. S. 36, 40, decided November 13, 1950, that—

> "Our supervisory power over the judgments of the lower federal courts is a broad one."

(b) Constitutionality of the Right of the United States to Sue.

United States District Judge Rodney in an article entitled "History of Rent Control Laws with Respect to Damages Allowable Thereunder" appearing in 9 Federal

Rules Decisions, pp. 501-505, has thoroughly reviewed rent control laws. Judge Rodney's history shows who was entitled to sue during various periods since the original enactment in 1942. The history correctly shows that since April 1, 1949, the tenant, and the United States if the tenant does not sue in thirty days, have a right to sue. The United States had no cause of action prior to April 1, 1949, and since that date has had a restricted one. The constitutionality of the Act of Congress purporting to give this right, namely Section 204 of the Housing and Rent Act of 1949, has not been passed on by this Court. *Woods v. Miller,* 333 U. S. 138, upholding the constitutionality of the Housing and Rent Act of 1947, was decided February 16, 1948, more than one year before the passage of Section 204 of the 1949 Act. The 1949 amendment not being in existence it could not have been sustained by this Court in *Woods v. Miller. United States v. Shoreline Cooperative Apartments,* 338 U. S. 897, decided December 12, 1949, reversing 84 Fed. Supp. 660, *per curiam* on the authority of *Woods v. Miller,* did not pass on the point petitioners raise here. So the question of the constitutionality of the right of the United States to sue civilly one citizen (landlord) for and on behalf of another (tenant) is undetermined by the Supreme Court. Such paternalistic action by the Government had not been attempted heretofore.

This Court has held that the United States has no right to sue for damages for injuries to one of its soldiers. *United States v. Standard Oil Co.* (1947), 332 U. S. 301. A judgment in favor of the United States for such injuries which was given in 1945, 60 Fed. Supp. 807, was reversed by the Court of Appeals for the Ninth Circuit. That reversal was affirmed here. The trial judge who

rendered judgment for said injuries was the trial judge who rendered the judgment in favor of the United States in this case. Of course, in this case there was an Act of Congress purporting to give the right to the United States to file such a suit on behalf of a tenant. A law giving such power to the Executive Department of our Government to maintain such suits effects a grave change in our form of government.

In the absence of an express amendment to the Constitution giving such power such an attempt should be held to be unconstitutional. Such a law should not be casually assumed to be sound and the constitutional question bypassed as the Court of Appeals has done. The effect of the Court of Appeals' ruling is to add two additional parties plaintiff, namely, the Price Administrator under the 1942 Act, an expired law, and the Housing Expediter under the 1947 Act, in order to sustain the judgment of the District Court. The question of the constitutionality of Section 204 of the Housing and Rent Act of 1949 should be thoroughly reveiwed by this Court. We were sued under it. The complaint specifically so alleged. Had it not been in effect we would not have been sued by the United States. We have questioned the constitutionality of Section 204 at every stage of this proceeding. The constitutional question is properly presented. If this law is constitutional then every one complaining of injury under Section 7 of the Sherman Anti-Trust Act is entitled to be provided with government attorneys and public assistance.

(c) Retroactivity of Section 204 of the Housing and Rent Act of 1949.

This section was not retroactive. It has been applied here back to 1945. Since the beginning this Court has held without deviation what has been so well stated by Mr. Justice McKenna in *Shwab v. Doyle* (1922), 258 U. S. 529, 534:

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. (Cases cited.) The comment of Story is 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' * * *
>
> There is certainly in it (Act there considered) no declaration or retroactivity 'clear, strong and imperative' which is the condition expressed in United States v. Heth, 3 Cranch 398, 413; also United States v. Burr, 159 U. S. 78, 82, 83;
>
> If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retrospective operation must be selected."

In the cases since *Shwab v. Doyle,* in chronological order this Court has reiterated the principle that laws are not retroactive in—

Fullerton v. Northern Pacific (1925), 266 U. S. 435;

United States v. Magnolia Co. (1928), 276 U. S. 160;

Brewster v. Gage (1930), 280 U. S. 327, 337;

Hassett v. Welch (1938), 303 U. S. 303, 314;

Claridge Apts. v. Commissioner (1944), 323 U. S. 141, 164.

In the *Claridge* case, above, this Court said:

"Retroactivity, even where permissible, is not favored, except upon the clearest mandate."

On the application of this Court's declarations against the retroactivity of laws alone the judgments of the lower courts should be reversed.

Three United States District Courts have held that the Housing and Rent Act of 1949 is not retroactive. Delaware, Aug. 4, 1949, 86 Fed. Supp. 933; Nebraska, Sept. 2, 1949, 86 Fed. Supp. 939, and Arkansas, western district, Sept. 29, 1949, 85 Fed. Supp. 968.

(d) Who Should Have Sued Here?

For a violation on April 1, 1949, or theretofore, or for thirty days thereafter, the tenant. The United States had no right until thirty days had expired after the law giving it the purported right to sue was passed. The Housing Expediter had a right to sue under the 1947 Act until the 1949 amendment was passed. He was not a party plaintiff.

Early on the morning of February 6, 1951, I watched on television the flash of the atomic explosion near Las Vegas, Nevada. As a part of the telecast there was a long distance telephone call from the station on Mount Wilson to the police department at Las Vegas. In answer to an inquiry about the blast there came a laconic but fact-filled three-word reply—"It sure shook!" Here

the United States sure sued. It did not wait the thirty day period required by law. It included a violation alleged to occur 21 days *after* the complaint was filed. As to another it waited but nine days before filing complaint.

(e) Authority of Attorneys for the Housing Expediter.

The 1949 Housing and Rent Act provided—"attorneys appointed by the Housing Expediter may, *under such authority as may be granted by the Attorney General,* appear for and represent the United States in any case arising under this Act."

The delegation of the Acting Attorney General, published in the Federal Register for October 6, 1949, read:

> "Pursuant to the authority vested in me by Sec. 205, Public Law 31, 81st Congress, attorneys appointed by the Housing Expediter are hereby authorized to appear for and represent the United States in any case arising under Secs. 205 or 206 of the Housing and Rent Act of 1947, as amended, and for that purpose to institute, conduct or maintain all civil actions, suits or proceedings, before or after judgment, arising under said sections of said act, and to defend the United States, the Housing Expediter or any officer or employee thereof, in any case arising under said act; Provided, however, that the foregoing authority shall not apply to any proceedings before the Supreme Court of the United States.
>
> Dated: September 24, 1949,
>
> PEYTON FORD,
> Acting Attorney General."

By its own terms the so-called authority was limited to Sections 205 or 206 of the 1947 Act as amended. It did not grant any authority to appear for the United States for any alleged violation of the 1942 Act, as amended. However, in this case they did so appear.

We must go to the source of the Attorney General's own authority. He does not have blanket power to appoint attorneys to represent the United States or to create a duplicate set of legal machinery to represent the United States in civil actions.

When the Housing and Rent Act of 1949 was passed on March 30, 1949, Section 507, then unamended, of Title 28, U. S. Code, had been in effect since September 1, 1948. The section then read:

> "(a) It shall be the duty of each United States Attorney, within his district to:
>
> (1) * * *
>
> (2) Prosecute or defend for the government, all civil actions, suits or proceedings in which the United States is concerned; * * *"

Section 503, Title 28, U. S. Code, reads:

> "The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires."

The Attorney General has authority to appoint attorneys to assist *not supplant* United States Attorneys.

The phrase "under such authority as may be granted by the Attorney General" in the 1949 Housing and Rent Act

did not confer any power on the Attorney General. He was bound by the provisions of Chapter 31, Title 28, U. S. Code, Secs. 501-510. Nowhere in this Chapter is there authority given the Attorney General which he may delegate.

The Court of Appeals in putting the burden of showing prejudice on the appellants for unauthorized appearance of attorneys for the United States has approved lax administration of the law.

Respectfully submitted,

DANIEL NEY DOUGHERTY,
Counsel for Petitioners.

APPENDIX.

HOUSING AND RENT ACT OF 1949, 63 STAT. 21.

Sec. 204 (a) Sec. 205 of the Housing and Rent Act of 1947, as amended, is amended by striking out from the heading of such section the words "*By Tenants*"; by inserting after the words "receives such payment", in the first sentence, the following: "(or shall be liable to the United States as hereinafter provided)"; and by changing the period at the end of the second sentence to a colon and inserting: "*Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations."

Sec. 205 "(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, *under such authority as may be granted by the Attorney General,* appear for and represent the United States in any case arising under this Act."